

QUARTERLY REPORT

July - September 1997

The **Quarterly Report** provides information to the Indiana State Board of Education on recent judicial and administrative decisions affecting publicly funded education. Should anyone wish to have a copy of any decision noted herein, please call Kevin C. McDowell, General Counsel, at (317) 232-6676.

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MEDICAL SERVICES, RELATED SERVICES, AND THE ROLE OF SCHOOL HEALTH SERVICES

An essential area of inquiry in developing the individualized education program (IEP) for a student with disabilities is what “related services” the student may require in support of the student’s educational program. While “related services” are defined broadly under the Individuals with Disabilities Education Act (IDEA) at 20 U.S.C. §1401(22) and in the Indiana State Board of Education’s rules at 511 IAC 7-3-44, 511 IAC 7-13-5, this concept does not include “medical services” except when such services are necessary for diagnostic or evaluation purposes. Typically, a public school is not required to provide medical services under either IDEA or Sec. 504 of the Rehabilitation Act of 1973. There is no corresponding definition for “medical services,” which has resulted in numerous legal disputes involving the extent to which a public school district’s school health services and ancillary personnel can accommodate a disabled student’s needs before the student’s medical involvement becomes such that the supportive services he requires are more “medical” in nature than “related.”¹

The seminal case in this area is Irving Independent School District v. Tatro, 468 U.S. 883, 104 S.Ct. 3371 (1984), discussed below, which found that “clean intermittent catheterization” of a student was a “related service” because it came within the ambit of “school health services,” which can be “provided by a qualified school nurse or other qualified person.”²

This has resulted in the courts dividing into two camps: (1) those employing an “undue burden” analysis to find a service medical in nature; and (2) those employing a so-called “bright line” analysis, which finds a service to be “related” so long as it need not be provided by a physician or a hospital. There have been no published cases in Indiana, but there is now one dispute within the 7th Circuit Court of Appeals. A host of medically related issues are being raised around the country. The following are representative.

¹The federal regulations at 34 CFR §300.16(a)(4) define “medical services” as those “services provided by a licensed physician to determine a child’s medically related disability that results in the child’s need for special education and related services.” See also 511 IAC 7-13-5(h).

²The Indiana General Assembly restored a marked degree of flexibility to public school districts this past session through P.L. 153-1997, Sec. 7, which amended I.C. 34-4-16.5-3.5 (Qualified Immunity of School Personnel Administering Medication to a Pupil). The amendments permit school nurses who are registered nurses to provide training to school personnel who would be responsible for injectable medications, such as insulin. Unintended amendments in 1993 interfered with public schools being able to utilize school nurses for this training.

A. Related Services versus Medical Services

1. Irving Ind. Sch. Dist. v. Tatro, 468 U.S. 883, 104 S.Ct. 3371 (1984). An elementary school student with spina bifida required clean intermittent catheterization (CIC) in order to attend school. The school refused CIC services, claiming this was not a related service under IDEA and Sec. 504 but a “medical service” which it did not have to provide except for diagnostic or evaluation purposes. The U.S. Supreme Court held that CIC is a “related service.” The federal definition of “related services” includes “school health services” which are “provided by a qualified school nurse or other qualified person.” “Medical services” are “provided by a licensed physician.” CIC can be provided by a school nurse or a trained layperson.
2. Letter to Greer, 19 IDELR 348 (OSEP 1992). The Office of Special Education Programs (OSEP) of the U.S. Department of Education reiterated the Tatro holding, applying its three-prong test in determining whether a service is related or medical: (1) Does the child have a disability requiring special education? (2) Is the service necessary to assist the child to benefit from special education? and (3) Can the service be provided by a nurse or other qualified professional? This would apply only where it is necessary to provide these services during school hours.
3. Letter to Johnson, 1 ECLPR ¶315 (OSEP 1993). Applying the three-prong Tatro test, OSEP advised that training on reversing a child’s pattern of aspirating during feeding could be a related service if it can be provided by a qualified professional other than a licensed physician.
4. Neely v. Rutherford County Schools, 851 F.Supp. 888 (M.D. Tenn. 1994). An elementary school-aged child had Congenital Central Hypoventilation Syndrome, a breathing disorder which often requires a tracheostomy. The child had a breathing tube inserted through an opening made in her throat. The tube must remain in place at all times, but it can be dislodged relatively easily. Suctioning is required to keep passage clear. The child is unable to provide or assist in her own care. The child is fragile, and could suffer brain damage or death if the air passages become blocked. Care is almost constant. The parents had been coming to school to provide these services, but eventually they requested the school to assume this responsibility by hiring a full-time nurse or respiratory care professional. The school hired a nursing assistant to provide the service. The parents withdrew the child from school. She received home instruction while a due process hearing was conducted. The hearing officer upheld the school. The district court reversed the hearing officer, noting that Tennessee law requires these services to be provided by a licensed nurse or respiratory care specialist. The court also noted that the full-time care of the child “is clearly medical in nature” and had the costs been “too burdensome,” the service would fall within the medical exclusion such that the school would not have to provide the service. The 6th Circuit Court of Appeals reversed the district court, finding that the constant nursing care was medical in nature and was an “undue burden” upon the school. Neely v. Rutherford County Sch., 68 F.3d 965 (6th Cir. 1995).

5. Fulginiti v. Roxbury Township Public Schools, 921 F.Supp. 1320 (D. N.J. 1996). An elementary school child with severe disabilities and a tracheostomy also required a feeding tube inserted directly into her stomach. Her tracheostomy tube required constant suctioning to clear blockages. The parents had been taught to perform the monitoring and suctioning procedures. The child also received 16 hours daily nursing care through a Medicaid waiver. The child needed full-time nursing care in school and while being transported. The school and the parents disagreed as to whether the monitoring and suctioning procedures were related or medical services. The dispute was submitted to a due process hearing officer, who ruled that the services were medical in nature and thus excluded. Constant nursing care is not a part of “school health services” nor is extensive particularized care. The court upheld the hearing officer, finding the cost factor and constant care were an “undue burden” upon the school district. For other important opinions applying “undue burden,” see Detsel v. Bd. of Education of Auburn, 820 F.2d 587 (2nd Cir. 1987) and Clovis Unified Sch. Dist. v. California, 903 F.2d 635 (9th Cir. 1990). Both Detsel and Clovis involved skilled nursing care, which the courts found to be a “medical service” because this exceeds the scope of typical school health services.
6. Cedar Rapids Comm. Sch. Dist. v. Garret F., 24 IDELR 648 (N.D. Ia. 1996). A middle school student with quadriplegia following an accident required the following health care services in order to attend school: urinary bladder catheterization, suctioning of tracheostomy, ventilator setting checks, ambu bag administrations as a back-up to ventilator, blood pressure monitoring, and observations to detect respiratory distress or autonomic hyperreflexia. A due process hearing officer ruled these services were related services and had to be provided. The school sought judicial review. The court upheld the hearing officer, applying the so-called “bright line” analysis. In a “bright line” analysis, the question is whether the services need be provided by a licensed physician or a hospital. If not, then the services are related. The court noted that the Neely court, *supra*, and others applied a different analysis which involved considerations of risk, liability and cost burdens. The 8th Circuit upheld the district court’s decision on February 7, 1997, finding that continuous nursing services are covered by IDEA because the services in question did not require a physician to provide them. 106 F.3d 822 (8th Cir. 1997). The school district has sought review by the U.S. Supreme Court. Although the Supreme Court has not yet decided whether they will review the decision, the Court in October, 1997, asked the U.S. Department of Justice to provide its opinion regarding the extent to which IDEA’s concept of “related service” should apply.
7. Skelly v. Brookfield LaGrange Park Sch. District 95, 968 F.Supp. 385 (N.D. Ill. 1997). This is a case of first impression within the 7th Circuit. The Illinois federal district court applied the “bright line” analysis to determine that the school needed to provide an aide to suction the student’s tracheostomy tube during school bus rides. The student is four years old and has a rare neurological-muscular disease which requires him to use a wheelchair, a gastro-intestinal tube (“G-tube”), and a tracheostomy tube. The tracheostomy tube is not

used to help the student breathe but to keep the airway passages clear. This suctioning process is not complicated, but the student is too young to perform the procedure himself. Due process hearing and review officers under IDEA found the service to be “medical” in nature and, therefore, the school district did not have to provide the suctioning. In reversing the administrative decisions, the court noted that “The ability of any person to learn to suction a tracheostomy tube does not require medical licensure. It only requires some training which...would best be provided to the trainee by [the student’s] family members. Suctioning of [the student’s] tracheostomy tube, especially the type of brief suctioning that [the student] may need during the bus ride to and from [the school], is a maintenance procedure and is not an invasive procedure.” *Id.*, at 389. The court added that the trained aide need not be a registered nurse or a licensed practical nurse. The student does not require one-on-one or private duty nursing care during the bus rides. *Id.* The district court cited to *Tatro* and acknowledged the “undue burden” standard from the 6th Circuit’s *Neely* case and the “bright line” analysis from the 8th Circuit’s *Cedar Rapids* dispute. *Id.*, at 391-93. The district court declined “to apply the burden test here because this court believes that a bright-line test is not only appropriate legally, but is necessary according to public policy in order to further the efficient and proper use of public funds earmarked for education.” *Id.*, at 394. The court expressed a belief that a “bright line” analysis will actually reduce litigation. “[W]ithout a hard and fast bright-line test that is factually easy for school districts to apply, litigation will continue to be spawned...[by school districts]...bent on spending tens of thousands of dollars on litigation to try to save a few hundred dollars on an aide to ride the school bus...” *Id.* In an interesting footnote at 395 (footnote 2), the court rebuffed the school district’s argument that the Illinois version of the Nursing Practices Act would supersede the IDEA. See *Unauthorized Practice of Nursing*, *infra*.

8. Kevin G. v. Cranston School Committee, 26 IDELR 13 (D. R.I. 1997). This case involves the consideration of the “least restrictive environment” (LRE) for an 11-year-old student who has a tracheal tube but whose medical condition requires occasional emergency assistance from a “qualified nurse.” Although the court acknowledged that IDEA expresses a preference for a student’s “home school” (where he would typically attend but for some intervening reason), a student’s medical condition and the allocation of specialized personnel, such as full-time nurses, can result in a placement at a school other than the student’s neighborhood school. IDEA does not mandate the assignment of a full-time nurse to the student’s neighborhood school.

B. Student Medications

1. San Juan (Ca) Unified School District, 20 IDELR 549 (OCR 1993). The school district properly evaluated the student’s educational needs in light of diagnosed Attention Deficit Hyperactivity Disorder (ADHD), including the identification of dispensing of medication (Ritalin) as a related service. The student, a 13-year-old with a long history of attentional problems and impulse control deficits, was made responsible for ensuring she took her medication as prescribed. There was no plan or process to ensure that the student did so. This constituted a denial of a related service and, hence, a denial of a “free appropriate

public education” (FAPE).

2. Pearl (MS) Public School District, 17 EHLR 1004 (OCR 1991). The school district’s policy of prohibiting school personnel from administering Ritalin during school hours to students identified as having ADHD violated Sec. 504 of the Rehabilitation Act of 1973.
3. Huntsville City (AL) School District, 25 IDELR 70 (OCR 1996). The school district’s medication policy required generally that students with diabetes who needed to use a glucometer to monitor the level of glucose in their blood to come to the office. The school district’s medication policy did permit a case-by-case analysis and exceptions where indicated. One student, for example, was medically required to carry her glucometer with her at all times. The Office for Civil Rights (OCR) determined that the school district has not violated Sec. 504 or Title II, Americans with Disabilities Act (A.D.A.).
4. Valerie J. et al. v. Derry Cooperative School District, 771 F.Supp. 483 (D. N.H. 1991). A student’s right to a FAPE cannot be premised upon the condition that the student be medicated (Ritalin) without the parents’ consent. The parents previously had the student on Ritalin, but while the drug “took the edge off” the student’s behavior, it left the student spacy, drugged or lethargic with a diminished attention span. The parents became opposed to the use of Ritalin, but the school insisted upon its use as a prerequisite to the student receiving educational services. A hearing officer upheld the school, but the district court found such a prerequisite inconsistent with federal disability laws.
5. Nieuwendorp v. American Family Insurance Co., 529 N.W.2d 594 (Wisc. 1995). The parents of a student with ADHD who was impulsive and aggressive were liable to a teacher for personal injuries when the parents unilaterally removed the student from the medication that was controlling the student’s impulsive and aggressive behaviors. The student injured the teacher’s neck when he pulled her hair, causing her to fall to the floor. The teacher had been called to the classroom to help control the student’s behavior. The parents had not informed the school that they had removed him from his medication nor had the parents informed themselves about the possible behavioral consequences from doing so. Had the school known of the parents’ actions, it could have responded by developing a plan to manage the student’s behavior. The parents’ failure to exercise reasonable care was the proximate cause of the teacher’s injuries.
6. Complaint No. 992-96. This was a complaint investigation conducted under 511 IAC 7-15-4 by the Indiana Department of Education, Division of Special Education. The student was in the seventh grade and required medication to control seizure activity. The parent wanted the student to carry and self-administer his medication and did not wish for school personnel to assist him in any way in this respect. The school district medication policy does permit some students to be responsible for the self-administration of medications, but this is based upon the age and maturity of the student and the severity of the medication. Self-administration has to be approved by the student’s physician, the parent, and the

school official, which could be the school nurse. The investigation results upheld the school district's policy, holding that no student has a right to dictate self-administration of medication while at school. Although the report noted that "A long-range goal for any student on medication is self-sufficiency," a school district can place reasonable restrictions based upon such factors as age, maturity, the seriousness of the medication, the medical involvement of the student, and the safety of other students.

C. Liability

1. Nance v. Matthews, 622 So.2d 297 (Ala. 1993). An elementary school student with spina bifida needed to be catheterized at school following bladder surgery. An aide who was trained to catheterize the student failed to do so on one day, allegedly resulting in physical injuries to the student, who sued the aide and school officials for negligence. The court sustained the dismissals from the suit of the school nurse, the principal, and the special education supervisor, finding that they had qualified immunity from charges they negligently supervised and retained the aide. The court stated no qualified immunity would apply where bad faith or fraud is involved, but there was no evidence that such was the case in this dispute. The court did not dismiss the aide from the suit.
2. Ian E. v. Bd. of Education, Unified Sch. Dist. No. 501, Shawnee County, Kansas, 21 IDELR 980 (D. Ks. 1994). The school district refused to administer Clonidine to a student based upon alleged safety concerns, requiring instead that the parents come to school to do so. The parents hired an attorney and requested a hearing. The school reversed itself and agreed to administer the medication. The court found the school liable for the attorney fees the parents incurred in challenging the school's refusal to administer the medication.
3. Davis v. Francis Howell Sch. Dist., 25 IDELR 212 (8th Cir. 1997). The 8th Circuit Court of Appeals has determined that a school district in Missouri did not violate the Americans with Disabilities Act when it declined to provide Ritalin in excess of the recommended maximum daily dosage. The student's physician had prescribed 360 milligrams a day of Ritalin to address the student's ADHD. The school nurse administered the medication in school for two years before she noticed the prescription exceeded the maximum daily dosage recommended by the *Physician's Desk Reference*. The school nurse asked the parent to obtain a second physician's opinion regarding the Ritalin dosage. The second doctor wrote that the dosage was safe. Nevertheless, the school nurse declined to provide Ritalin to the student at the dosage prescribed because of concern for the student's health. The school permitted the parent to come to school and provide the medication to her son. The 8th Circuit panel ruled that the family had not suffered "irreparable harm" by the school's actions.
4. Pueblo (CO) Sch. District No. 60, 20 IDELR 1066 (OCR 1993). The school district did not violate Sec. 504 and Title II, A.D.A., when it discontinued the administration of

prescription eye drops to a student when the parent failed to produce an updated prescription from the physician. However, OCR noted that the school had continued to provide the eye drops every thirty (30) minutes even though the last prescription was over two (2) years old. The school discontinued the eye drops after the complaint was initiated. This constituted retaliation for engaging in a protected activity (advocating for someone's civil rights), thus violating Sec. 504.

D. Unauthorized Practice of Nursing

1. Stamps v. Jefferson County Board of Education, 642 So.2d 941 (Ala. 1994). Teachers of students with severe disabilities unsuccessfully sued the school board, claiming their assigned teaching responsibilities violated the Nursing Practices Act (NPA). The teachers claimed they were required to perform direct line feedings, gastronomy with button, insertion of tubes, suctioning of tracheostomy tubes, administration of prescribed medications, and the changing of colostomy bags. These activities, the teachers asserted, were either medical procedures or "the unauthorized practice of nursing." The suit was dismissed for failure of the teachers to include the Board of Nursing as a necessary party.
2. Rhode Island Dep't of Elementary and Secondary Education v. Warwick School Committee, 696 A.2d 281 (R.I. 1997). The Rhode Island Supreme Court had to resolve an apparent conflict between State law requiring "school health programs" to be staffed by "certified nurse-teachers" and a school district's compliance with IDEA's requirement to provide related services to a six-year-old child with an open tracheostomy which required constant monitoring. The student's IEP described the related services the student would require, which included one-to-one attention and tube suctioning. The school contracted with a registered nurse, whose sole function was to attend to the student. She did not perform any health-related services or instructional services to any other student. The court found that the one-to-one service was restricted to the student and was not a part of the "school health program" such that the nurse would have had to be a state-certified "nurse-teacher." Because this case is fact-specific and the services were pursuant to an IEP, the court did not expand its holding beyond this situation.

E. License Revocation and Suspension

1. McKinney v. Castor, 667 So.2d 387 (Fla. App. 1995). The court reversed the State's suspension of school administrator's teaching license and three-year probation. The suspension was based in part upon allegations the administrator failed to secure student medications. Florida law requires student medications to be secured "under lock and key." The principal kept the medications in a school vault which also held school supplies. The vault was open during the school day. This practice was in place when the principal assumed his responsibilities there. However, the vault was supervised. Nonetheless, several parents noticed the supplies of their children's medications were depleted too quickly and complained. The principal then purchased a lock box with two keys to store

the medications. The court found that the supervised vault satisfied state law, and the principal's remedial action was an appropriate response to the security concern. The State lacked credible evidence to support suspension of his teaching license.

LIMITED ENGLISH PROFICIENCY PROGRAMS: CIVIL RIGHTS IMPLICATIONS

The Office for Civil Rights (OCR) of the U.S. Department of Education has become embroiled in a somewhat public controversy with the Denver, Colorado, Public Schools over the school district's programs for its 13,600 students with limited English proficiency (LEP). OCR's investigation found several deficiencies in Denver's programs with respect to identification and assessment of potential LEP students, adequate support services within LEP programs, and sufficient services to enable LEP students to participate more in the mainstream of school life and activities (*School Law News*, August 8, 1997). OCR ordered corrective action, but Denver refused, claiming that the remedial activities would create "an extra layer of bureaucracy and paperwork." OCR also found that LEP students in the Denver schools "are often taught by unqualified or under-qualified teachers." The school district acknowledged that recruiting and training of teachers for LEP students "has proven difficult." OCR also noted that the curriculum for LEP students was less demanding than the curriculum for the general education students, and that, in some instances, instruction was being provided by paraprofessionals rather than licensed teachers. Although the Denver Public Schools have submitted an Action Plan, it has been unacceptable to OCR (*Education Week*, September 3, 1997). OCR has referred the matter to the U.S. Department of Justice for legal action, which could result in the school district losing some or all of its \$30 million in federal financial assistance (*School Law News*, October 17, 1997).³

While the Denver dispute unfolds, OCR has been busy reviewing other LEP programs in other States, including Indiana. OCR recently concluded what it termed "pro-active compliance reviews" of programs for LEP students in eleven Indiana public school districts. OCR's review sought voluntary "Action Plans for Providing Equal Educational Opportunity for Limited English Proficient Students" as a means of implementing Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d *et seq.*, 34 CFR Part 100, which prohibits discrimination on the basis of race,

³OCR has support from the Congress. When Congress reauthorized the Individuals with Disabilities Education Act (IDEA), signed by the president on June 4, 1997, it made the following finding at 20 U.S.C. §1400(c)(7)(F): "The limited English proficient population is the fastest growing in our Nation, and the growth is occurring in many parts of our Nation. In the Nation's 2 largest school districts, limited English students make up almost half of all students initially entering school at the kindergarten level. Studies have documented apparent discrepancies in the levels of referral and placement of limited English proficient children in special education. The Department of Education has found that services provided to limited English proficient students often do not respond primarily to the pupil's academic needs. These trends pose special challenges for special education in the referral, assessment, and services for our Nation's students from non-English language backgrounds."

color, or national origin in educational programs and activities receiving federal financial assistance. OCR completed its first review on May 17, 1996, and its last one on August 29, 1997. The following is a composite of the Action Plans submitted by the public school districts to OCR.

Identification/Assessment

Each school district is to establish a means of assessing an individual student's English language proficiency and document the reason for identifying a student as needing a particular level of services. These assessments are to gauge especially proficiencies in writing and oral reading. Although OCR's reports do not reference Indiana's proficiency levels, there already exist five (5) levels of proficiency:

- Level 1:** The student does not speak, understand, read or write English but may know a few isolated words or expressions.
- Level 2:** The student understands simple sentences in English, especially when spoken slowly, but does not speak, read or write English, except for isolated words or expressions.
- Level 3:** The student communicates in English with hesitancy and difficulty. With effort and help, the student can carry on a conversation in English, read and understand at least parts of lessons, and follow simple directions.
- Level 4:** The student speaks and understands English without apparent difficulty, reads two (2) or more years below grade level and displays low academic achievement.
- Level 5:** The student speaks, understands, reads and writes in English without difficulty and displays academic achievement comparable to English-speaking peers at his/her grade level.

When assessing the degree of proficiency and fluency, oral language skills cannot be the sole criterion. Academic achievement and writing/reading abilities in English must also be considered.⁴

One school district agreed to implement interim assessment procedures, the Language Assessment Scales battery of tests (oral and reading/writing), in conjunction with its current procedures. These procedures will be utilized with any newly enrolled PHLOTE ("primary or home language other than English") student to determine whether such a student may be LEP and qualify for language assistance services. The procedures are to include the following:

- a. The use of a valid and reliable assessment test for measuring a student's English

⁴Indiana, by statute, has established as policy that the State will provide bilingual-bicultural programs in the public schools for qualified students. I.C. 20-10.1-5.5. The provision of appropriate instruction for students with LEP is also a consideration under Performance-Based Accreditation. See 511 IAC 6.1-5-8.

- proficiency which includes an evaluation of the student's oral, reading, writing, and comprehension skills as appropriate for the student's age and grade level;
- b. Other educational factors to be used in determining eligibility;
 - c. Specification of the circumstances under which the assessment battery can be stopped because a student is unable to continue;
 - d. Time frames for initial assessment and placement decisions;
 - e. Eligibility criteria;
 - f. Staff who will make eligibility and placement determinations;
 - g. The rationale for using any additional, educationally justifiable factors for determining eligibility for placement; and
 - h. A written description of its educational justification for choosing its assessment instrument(s) and the cut-off scores needed to be considered eligible for special language assistance.

Placement

Placements of LEP students need to be based upon a valid determination of English proficiency, although this is to be balanced with adequate language support for low-incident students who do not attend bilingual centers. In addition, bilingual teachers with multi-grade level classrooms need to provide students with age and grade appropriate curriculum in accordance with individualized plans for the students.⁵ Nevertheless, placement decisions are to be made based upon a student's individual need and not on the availability of staff.

Exiting

Although there is little agreement among the various Action Plans regarding the extent of parental involvement in program changes, including exiting of the program, there is general agreement that any program change, including significant alteration in service delivery, is to be based upon recent assessment results and other relevant documentation. The MSD of Washington Township was more detailed in its criteria and procedures for a student's exit from language assistance services. The procedures include the use of a valid and reliable assessment tool which measures oral, reading, writing, and comprehension skills appropriate to grade level, as well as the following:

- a. The scores necessary for exiting;
- b. Other criteria used in making the exiting decision, such as grades and standardized

⁵ The Action Plans submitted by the schools contain various designations for these individualized plans. Gary Community Schools referred to the plan as an Individual Plan Report (IPR) for Bilingual Students while the MSD of Pike Township referred to it as an "English as a Second Language (ESL) Individual Education Plan." Notwithstanding the various designations, the plan is designed to assist teachers in writing and determining realistic goals and objectives for ESL/LEP students in each course.

- test scores;
- c. Others who will be consulted for feedback regarding student performance, such as general education teachers, language assistance program teachers, principals, and parents;
- d. Staff authorized to make exiting decisions;
- e. At least annual consideration for exiting; and
- f. Provisions for exiting students mid-year, when appropriate.

Educational Records

Many of the Action Plans, following OCR's directions, require much of the documentation used in the evaluation, identification, and placement procedures, including an individualized plan, to be included in the student's educational record (referred to in the reports as "cumulative folders").

One school district uses what it characterizes as a "Home Language Census Survey" (HLS), which it provides to students upon enrollment. The HLS is to be available in languages other than English, and there should be interpreters to assist. In any case, the HLS is to be kept in the student's educational record.

Monitoring

The school districts are to develop criteria and procedures to monitor students who exit ESL/LEP programs in order to ensure the students are performing in the general education programs without significant barriers caused by limited English proficiency. This monitoring would include information from and observations by general education teachers.

Staffing

All Action Plans contained assurances that the school districts will employ licensed or certified ESL teachers so that services can be based upon individual needs rather than available staff. Several school districts hired additional licensed staff in response to the compliance reviews.⁶ The school districts also assured that there would be sufficient interpreters and translators to ensure comparable access to school services and activities by LEP students. The schools are to create and maintain lists of qualified interpreters and include these in parent/teacher handbooks. Several school districts will use "distance learning" as a means of providing ESL programs or expanding current programs.

⁶ The Indiana Professional Standards Board offers an ESL minor, grades K-12, based upon 24 semester hours. This is an endorsement to the Standard/Professional license. Although the holder of the all-grade ESL minor is eligible to teach ESL in grades K-12, this "certification is not required for teaching ESL students in Indiana. Individuals who plan to teach in this area are strongly encouraged to complete the certification pattern." 515 IAC 1-1-20(c).

Instruction is to be provided by properly licensed teachers. Language assistance paraprofessionals are to provide support and tutoring services only.

Although a school district is to hire appropriately licensed/endorsed ESL teachers, a school can hire or assign current licensed teachers who are making “satisfactory progress towards an ESL endorsement and agree to complete it within a reasonable amount of time.” A “reasonable amount of time” means by the start of the 2000-2001 school year. OCR agreed to consider as “qualified” one school district’s licensed teachers who had been teaching successfully in the district’s ESL program for at least one year if the teachers secure the endorsement under 515 IAC 1-1-20 or by “acquiring and demonstrating the following competencies...linguistics; second language acquisition; ESL methodology; multi-ethnic/American culture; assessment of ESL students; and children and adolescent literature.” These competencies are actually required for an ESL endorsement, but “may be developed by participating in 108 clock hours of workshops, seminars, educational courses, training by the Indiana Department of Education, and other such professional development activities which are approved by and provided by experts in the field. The hours will be divided equally among the competencies.” Three semester hours of college credit can be substituted for 18 clock hours. In one school district’s Action Plan, OCR agreed to waive these requirements for teachers currently employed in the ESL programs who are within three (3) years of retirement so long as such teachers receive “a one-time intensive training in all of the competencies where the teachers need additional training” to be followed by annual inservice training with respect to the provision of language assistance services to LEP students until the teachers retire.

Although OCR includes the evaluation of language assistance staff members as a part of the Staff Performance Evaluation Plan (see I.C. 20-6.1-9), it defers to any reasonable, negotiated agreement between a school district and the teacher’s bargaining unit so long as any such staff performance evaluations “be performed by or consider input by staff knowledgeable about ESL and/or bilingual techniques.” Not all Action Plans included the bargaining units in this phase.

Even though most Action Plans contain general statements regarding student-teacher ratios, the Action Plan for Elkhart Community Schools provides for a ratio of 30-to-1 except where there are “substantial increases in the number of LEP students.” In this event, the ratio could be 40-to-1.

Several school districts included their Title I teachers in language development training in order to assist such teachers in effective methods for working with LEP students in content areas. Others include general inservice training for non-ESL staff to familiarize personnel with the operation of language assistance programs.

Parental Notification/Involvement

Only one report (Gary Community School Corporation) referred to the creation of a Parent Advisory Committee. Although OCR offered technical assistance in this regard, the report also

indicates that the school district would seek assistance from the University of Michigan's Programs for Educational Opportunities. Oddly enough, parental notification and involvement is the least specific area addressed by OCR in its compliance review and the school districts in their respective Action Plans. The following is illustrative.

Handbooks: All school districts intend to include notifications in student handbooks, newsletters, and other school publications advising parents of language minority students of school activities. Some schools will include a contact person with a telephone number. Some schools will include such notifications only in the predominant non-English language within the school district while other school districts will include several languages, disseminate the handbook to staff, and include the handbook on its computer network. Several districts will include the names and telephone numbers of available interpreters and translators. Some school districts specifically included revising their forms. Some schools intend to have public meetings and invite students and parents to attend.

Intransigence: Although there does not appear to be any requirement for a parent to provide consent for placement in ESL/LEP classes or to receive such support services, OCR seems to indicate this is a requirement. Where a parent refuses consent, the school district is to develop procedures to track the progress of such students and to report to the parent. If a student's performance is below grade level, services are to be offered again.

Placement: Although OCR seems to indicate that parental consent is required for placement, there does not appear to be any such requirement when a change in placement—including exiting the program—is contemplated. In one school district's report, involvement of the parent in exit/transition decisions can be achieved by providing information to the parent and consulting with the parent regarding program changes. Other school districts' Action Plans actively involve parents in the exiting decision. Several school districts include annual reviews and other procedures which are modeled after special education practices.

Vocational Education

School districts are to provide “meaningful notice” concerning vocational programs, including information regarding the recruitment and application processes and eligibility criteria. This should occur at least during the scheduling process. There should be a staff contact person, and there should be adequate staff and ancillary staff to provide support, including language assistance. School districts should advise staff, especially guidance counselors, to ensure vocational education procedures include consideration of ESL/LEP students.

Gifted and Talented Programs

School districts are to ensure the application and selection process do not rely solely upon measures of English language proficiency. OCR seemed particularly concerned about this program area, and especially the general reliance upon standardized test scores as the major criterion for admittance. Several school districts will engage in system-wide audits of their gifted/talented programs, some by independent agencies, to assess the respective identification and placement procedures to ensure otherwise qualified LEP students are not overlooked.

Several school districts will study reports from the National Research Center on Gifted and

Talented and the National Clearinghouse for Bilingual Education in identifying alternative means for assessing giftedness in LEP students.⁷

Special Education Services

OCR was concerned about the lack of adequate bilingual staff to assist in various interventions and screenings conducted by school districts, including General Education Intervention efforts (see 511 IAC 7-10-2). School districts agreed to ensure there are knowledgeable bilingual staff members actively participating in interventions, screenings and multidisciplinary team meetings where a language minority student is being evaluated. School districts assured OCR that evaluations would be conducted, where appropriate, in the student's native language, although this is already a requirement by the Indiana State Board of Education. See 511 IAC 7-10-3(h)(1). The school districts agreed to compile a list of valid and reliable assessment instruments for conducting educational evaluations of LEP students, and to instruct staff in their appropriate use. School districts are to maintain a list of certified/licensed bilingual special education staff, either directly employed or through an independent contract, and to inform personnel of this list. For LEP students who are determined eligible for special education services, either the Case Conference Committee report, 511 IAC 7-12-1(m), or the student's Individualized Education Program, 511 IAC 7-12-1(k), should "include a section demonstrating a student's English language proficiency." There were several specific assurances which were included in the Action Plans:

Speech/Language Pathologists: ESL students should not be automatically excluded from receiving speech/language services based upon the students' LEP status.

School Psychologists: One school district assured it would make "good faith efforts to locate and use bilingual psychologists during evaluations for special education when needed and document all such efforts in the IEP." (It is unlikely the school district will be successful. A bilingual psychologist—in any field—is difficult to find in Indiana.)

Pre-Referral Process: It is not clear what OCR means by a "pre-referral process." There are several intervention programs and screenings, but these are not mandatory and are not designed to delay an educational evaluation under 511 IAC 7-10-3 to determine eligibility for

⁷ The Indiana State Board of Education's rules for Gifted and Talented programs require, as a condition for receipt of grant funds or waivers, that local selection committees rely upon information from a variety of sources, including grades, test scores, work products, teacher ratings, and "[o]ther identification measures specifically designed to identify students from underserved population groups, such as minorities, learning disabled, culturally disadvantaged, and underachievers." 511 IAC 6-9-8(a)(1)(E).

special education services. Nevertheless, one school district assured OCR it would revise its “pre-referral process” to ensure staff are aware of the circumstances where an LEP or potential LEP student should be referred for evaluation for possible special education services.

Magnet Programs

This appears only in the Action Plan submitted by the Indianapolis Public Schools (IPS), although it incorporates assurances provided by other school districts with respect to their vocational education and gifted/talented programs. IPS agreed to revise its application process so that selection is not based solely upon student achievement scores. The following also appears (as it did in most of the other Action Plans): “Since LEP students are exempted from standardized testing, a waiver of the standardized test scores or alternative criterion for admittance will be allowed in those programs relying upon standardized test scores to gauge eligibility.” It is not clear where OCR arrived at this somewhat global statement regarding exemption from standardized testing. Under Indiana's Statewide Testing for Educational Progress (ISTEP+), an LEP student is exempt from participation if the student has a primary language other than English, has limited proficiency in English (see the five levels of English proficiency under *Identification/Assessment, supra*), and reads two (2) or more years below grade level. This would not exempt all LEP students. The State Board of Education's rules also permit LEP students to participate in the ISTEP+ program for “diagnostic purposes.” 511 IAC 5-2-3(a)(2),(c). Although the State Board is reviewing its rules for ISTEP+, there appears to be a general sentiment among the State Board to include more students in the statewide assessment rather than exclude them.

IPS's revised procedures, which will also address its honors and advanced courses, will notify LEP students and their parents of the enrollment process and eligibility criteria, as well as the name of a staff person who can answer questions about a particular program. Qualified LEP students are to receive necessary language assistance services to ensure effective participation.

Adequacy of Facilities/ Instructional Materials

Some Action Plans referred to specific school buildings and the reallocation of staff or classes in order to provide LEP students with comparable access to certain school services, especially counseling, social work services, and special education programs. Staffing (see above) was of particular concern to OCR, especially the availability of qualified interpreters and translators at targeted schools to ensure “desirable student-teacher ratios” despite fluctuating numbers.

Several school districts assured OCR that the quality and quantity of instructional materials available would be adequate “to meet English language acquisition and academic needs of LEP students.”

Where the school district has developed specific grading guidelines, including ESL grading guidelines, school staff are to be made aware of such guidelines so as to ensure that ESL students

are consistently graded, with modifications and accommodations accounted for. Several school districts are to develop guidelines to ensure that non-English speaking students at all levels are receiving “meaningful access to content area instruction and can gain credits toward graduation.”

Integration of LEP Students with Grade-Level Peers

Although this is never identified as a specific area of concern and is not included separately in the continuing OCR monitoring activities, it is referenced throughout. The concept is roughly similar to the “least restrictive environment” (LRE) found in special education and in other programs for students with disabilities. See, for example, 511 IAC 7-12-2. The thrust here is to ensure the adequacy of teachers, ancillary staff, materials, curriculum modifications/accommodations, and periodic review to ensure, as much as practical and as appropriate to a student’s needs, that such affected students are provided with age and grade appropriate instruction with opportunities to interact with English-proficient peers. For example, in several Action Plans, the districts assured OCR that it “will continue to provide LEP kindergarten students with English-language development and content instruction which is appropriate to meet their needs.” These services will be provided by licensed teachers “who are appropriately trained in the methodologies of second language acquisition and in making content comprehensible to LEP students.”

“CURRENT EDUCATIONAL PLACEMENT”: THE “STAY PUT” RULE AND SPECIAL EDUCATION

The Individuals with Disabilities Education Act (IDEA) generally requires a student to remain in the student’s “current educational placement” during the pendency of administrative and judicial proceedings brought under this law. See 20 U.S.C. §1415(j) and 511 IAC 7-15-5(h). The student’s placement can be changed where the parent and the public agency agree to do so, there is typical grade advancement, or the hearing involves certain serious disciplinary matters. See §1415(k)(7). This is often referred to as the “Stay Put” rule or the “Status Quo” rule. Neither IDEA nor its Indiana counterpart, 511 IAC 7-3 *et seq.* (“Article 7”) define “current educational placement.” With older students being served or seeking services under IDEA, it is becoming difficult in some instances to define this concept beyond the facts peculiar to a given situation.

A recent complaint investigation (No.1145-97) by the Indiana Department of Education, Division of Special Education under 511 IAC 7-15-4 addressed the ramifications of the “stay put” provision for a 22-year-old student who was the subject of a special education due process hearing (No. 944-97). The parents and the school district had a history of marked disharmony, which had resulted in previous hearings. Although a due process hearing had been requested and the student was to remain in her “current educational placement” absent agreements of the parties, the school contacted the parents the day after her 22nd birthday and indicated that, because she was 22 years old, she was no longer eligible for special education services.⁸ The parents were asked to remove their child from school or the police would be called to remove her from the school. The Independent Hearing Officer (IHO) ordered her back into school. Although the

⁸The school did file a motion with the IHO to deny the application of the “stay put” provision. The IHO was out of the state and was not able to rule on the motion before the school unilaterally sought to remove the student.

parties eventually reached a resolution and the hearing was dismissed, the IHO referred the school's actions to the IDOE's Division of Special Education. In his letter, the IHO stated that he believed "there would be benefit to the school in particular from a review by the Division of Special Education. I ask that the Division follow up on this matter and provide guidance to the school regarding students who become 22 years of age during the school year."

The Division of Special Education (DSE) designated the issue as one for investigation under 511 IAC 7-15-4, 34 CFR §300.660-300.662. The school attempted to defend its action by citing to Board of Education of Oak Park & River Forest High School Dist. v. Illinois State Board of Education, 79 F.3d 654 (7th Cir. 1996), which involved a claim for compensatory educational services by a student about to turn 21 years of age.⁹ The student turned 21 years of age while the matter was pending. A hearing officer ordered six months of compensatory education, but the school refused to comply, choosing instead to seek judicial review of the decision on the ground that the "stay put" provision does not apply to a student whose age has exceeded IDEA's age limitations. The district court ordered the school to fund the compensatory education, and to honor the "stay put" provision, which it did while it appealed to the circuit court. The 7th Circuit reversed the district, finding that the "stay put" provision of IDEA ceases to operate when a student reaches the age of 21. *Id.*, to 659-60.¹⁰

The school's reliance was misplaced. There was present a significant procedural defect. Although all IEPs are to have projected dates for the initiation and duration of services, 511 IAC 7-3-20, 511 IAC 7-12-1(k)(6), this student's IEP contained no such dates at all. The school and the parents had never reached agreement as to what date services would cease. Although the school was aware of this deficiency, it never sought to cure it through a due process hearing request. The school could not rely upon its stated preference to cease services when the student turned 22 years of age. The DSE cited the school for violating the student's due process rights.

⁹ There is some uncertainty in some states whether the IDEA applies *until* a student is 21 years of age or until a student completes his 21st year. Indiana statute defines such a student as "less than twenty-two years of age ." IC 20-1-6-1(1), 511 IAC 7-4-1(a).

¹⁰The 7th circuit was applying only IDEA, a federal funding law. It was not addressing any other federal law, such as Sec. 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act, nor did it address whether a particular state law may require educational services beyond IDEA's limitations.

The school sought reconsideration of complaint.¹¹ The DSE's response contained the following relevant observations:

- Although IDEA contains age limitations, its implementing regulations at 34 C.F.R. §300.122(c) requires services through age 21 except where this “requirement would be inconsistent with state law or practice...”
- The state law and practice in Indiana “is to support the continued provision of services for students who turn age twenty-two (22) until the end of the school year in which the student turns twenty-two (22).”
- The school district and cooperative were aware of this practice because they submitted an application for alternative/residential services to the DSE for State funding for a student who is 22 years and six months old, and for whom they sought services until June 30, 1997.
- There is no justification to disobey a “stay put” order from an IHO. The 7th Circuit decision is inapplicable because it addressed a different claim and involved Illinois practices, which differ from Indiana.

There have been other recent decisions involving the “stay put” provision of IDEA.

1. Board of Education of Community High School Dist. No. 218 v. Illinois State Board of Education, 103 F.3d 545 (7th Cir. 1996), a case decided after the Oak Park and River Forest case *supra*. This case is an action by a school district against various State agencies and the parents of a disabled student seeking to avoid payments for the student's placement at a private facility in another state. Although the student had been returned to an Illinois facility, his disabling conditions proved too involved to be managed effectively. While administrative and judicial proceedings were pending, the parents placed the student in the out-of-state facility where his IEP could be implemented. (The fact situation is more involved than this.) The court noted at 548 that “educational placement” is not “statutorily defined” so that “identifying a change in this placement is something of an inexact science.” The court added at 549:

Hesitant to definitively establish the meaning of “educational placement” for our circuit, we adopt our sister circuits’ fact-driven approach. We accept the outer parameters of “educational placement” that it means something more than the actual school attended by the child and something less than the child’s ultimate educational goals.

Since the school did not produce a placement where the student’s IEP

¹¹Although 34 C.F.R. §§300.660-300.662 require complaint investigations under IDEA to be completed within 60 days, Indiana conducts its investigations within 30 days, absent exceptional circumstances. 511 IAC 7-15-4(e). This permits a party to request reconsideration by the State Director of Special Education. 511 IAC 7-15-4(h). The entire process does not exceed the 60-day time limitation in IDEA. 511 IAC 7-15-4(k).

could be implemented but the parents did find one, the school is financially responsible for the cost of the “current educational placement.” The court added that the IDEA provides the student and his parents a “guarantee” that he will have “an uninterrupted education during a contest between the school board and the parents.” *Id.*, at 550.

2. Bayonne Bd. of Education v. R.S. by K.S., 954 F.Supp. 933 (D. N.J. 1997). This case is somewhat similar to the Community High School Dist. No. 218 case, *supra*, but less convoluted. R.S. is an autistic student who had been placed by his parents in a private school. The parents asked the school to pay the costs of the student’s education. While a due process hearing was pending, the parties reached a settlement whereby the school would pay the costs and the student would transfer to the school district for the next school year. There was a somewhat detailed transition plan, which the school failed to implement. The parents again requested the school pay tuition to the private school and provide transportation. During the due process hearing, the IHO determined that the student’s “current educational placement” was at the private school, and ordered the public school to pay the tuition until the hearing process can be completed. The public school appealed. The court made the following pertinent findings:

- The “current educational placement” is the school in which the IEP is “actually functioning” when the “stay put” provision of IDEA is invoked. At 941.
- The “stay put” provision is to preserve the “status quo” and “protect handicapped children and their parents during the review process. *Id.*

Because the student had not yet been placed in the public school program, his “current educational placement” was the private school, the last agreed-upon placement between the school and the parents.

3. Cole v. Metropolitan Government of Nashville and Davidson County, Tenn., 954 F.Supp. 1214 (M.D. Tenn. 1997). The public agency placed a number of students with disabilities at a private school in Franklin, Tenn. Thereafter, the agency sought to move the students to a different facility in Madison, Tenn. The parents initiated due process hearings to prevent the removal to a different school, and sought reimbursement for the continuing costs of the private school. The court, while acknowledging that a change in physical location does not necessarily equate with a “change in placement,” found that the requests for due process hearings invoked the “stay put” provision of IDEA. The court found:

- The “stay put” provision is premised on the rationale that preservation of the status quo, rather than an inappropriate reaction to an emergent situation, provides for the best interests of the child. At 1219.

- The “stay put” provision is activated when a party alleges a violation under IDEA and initiates IDEA due process procedures. At 1220.
- Whether or not the agency’s proposed action constitutes an improper change in placement is a matter for consideration at the administrative due process hearing stage. It is unnecessary for the court to enjoin the agency. IDEA’s “stay put” provision operates to do just this. At 1221.
- The “current educational placement” refers to the operative placement actually functioning at the time the dispute first arises. At 1222.
- The “current educational placement” is not the placement proposed by the agency for the next school year. *Id.*
- “A school is required to bear the cost of keeping a student in the ‘current educational placement’” under IDEA. At 1223.

COURT JESTERS: THE SPIRIT OF THE LAW

Halloween brings to us every year the pleasant specter of children dressed in colorful costumes, glowing jack o’lanterns, multi-colored autumn leaves, abundant treats, and pernicious lawsuits (see **QR** July-Sept: 96). While most of these lawsuits are directed at preventing people from having fun during Halloween, none of these legal actions addresses the relative rights of denizens of the hereafter. One court now recognizes that such spectral visitors exist (if for no other reason than to prevent the living from benefiting financially from a curious form of “ghost employment”).

In Stambousky v. Ackley, 572 N.Y.S.2d 672 (A.D. 1 Dept. 1991), the New York appeals court rescinded a contract for the sale of a house which, unbeknownst to the buyer, was widely reputed to be haunted. The seller had taken great pains to create the impression the house was “possessed by poltergeists” such that it was included in a walking tour in the Village of Nyack, was mentioned in an article in *Readers’ Digest*, and was described in a newspaper article as “a riverfront Victorian (with ghost).” However, it was not advertised for sale in this fashion. The buyer lived in New York City and, as the court noted, “cannot be expected to have any familiarity with the folklore of the Village of Nyack.” Although New York law applies a strict rule of the *Caveat Emptor* (“let the buyer beware”), equitable considerations in this transaction led the court to rescind the contract and allow the plaintiff to recover his down payment. In essence, the court found that it is impractical to have a “psychic or medium” participate in routine house inspections. The court also noted that the seller promised to deliver the premises

“vacant” but failed to do so due to the presence of ghosts. The following is the gist of the court’s rationale:

While I agree with the Supreme Court that the real estate broker, as agent for the seller, is under no duty to disclose to a potential buyer the phantasmal reputation of the premises and that, in his pursuit of a legal remedy for fraudulent misrepresentation against the seller, plaintiff hasn’t a ghost of a chance, I am nevertheless moved by the spirit of equity to allow the buyer to seek rescission of the contract for sale and recovery of his down payment. New York law fails to recognize any remedy for damages incurred as a result of the seller’s mere silence, applying instead the strict rule of caveat emptor. Therefore, the theoretical basis for granting relief, even under the extraordinary facts of this case, is elusive if not ephemeral.

“Pity me not but lend thy serious hearing to what I shall unfold” (William Shakespeare, *Hamlet*, Act I, Scene V [Ghost]).

From the perspective of a person in the position of plaintiff herein, a very practical problem arises with respect to the discovery of a paranormal phenomenon: “Who you gonna’ call?” as the title song to the movie “*Ghostbusters*” asks. Applying the strict rule of caveat emptor to a contract involving a house possessed by poltergeists conjures up visions of a psychic or medium routinely accompanying the structural engineer and Terminix man on an inspection of every home subject to a contract of sale. It portends that the prudent attorney will establish an escrow account lest the subject of the transaction come back to haunt him and his client—or pray that his malpractice insurance coverage extends to supernatural disasters. In the interest of avoiding such untenable consequences, the notion that a haunting is a condition which can and should be ascertained upon reasonable inspection of the premises is a hobgoblin which should be exorcized from the body of legal precedent and laid quietly to rest.

Based upon the foregoing, the court found that “as a matter of law, the house is haunted.”

Two judges were spooked by this and dissented. “[I]f the doctrine of caveat emptor is to be discarded, it should be for a reason more substantive than a poltergeist. The existence of a poltergeist is no more binding upon the defendants than it is upon the court.”

Such is the spirit of our times.

QUOTABLE...

“Home Rule is the right to be misgoverned by our friends and neighbors.”

Judge Charles L. Brieant in Immediato v. Rye Neck School Dist., 873 F.Supp. 846, 849 (S.D. N.Y. 1995), quoting former New York Lieutenant Governor Frank C. Moore, while upholding the school district’s mandatory community service program.

UPDATES

Parochial School Students with Disabilities

As noted in **QR** April-June:97, the U.S. Supreme Court remanded K.R. v. Anderson Community Schools to the 7th Circuit Court of Appeal to reconsider its decision in light of the reauthorized IDEA. K.R. involves the extent to which a public school is required to make available special education and related services to a student with disabilities who was placed unilaterally in a parochial school. On September 10, 1997, the 7th Circuit reiterated its previous position that a public school is required to give voluntarily enrolled private school children a “genuine opportunity for equitable participation” in public school programs but is not required to offer comparable services at the private school. Because the public school offered the student an appropriate program at a public school, it was not required to provide an instructional assistant for the student at her parochial school. The court noted that the reauthorized IDEA at 20 U.S.C. §1412(a)(10) provides legislative clarification that a public agency is not required to pay the costs for special education and related services for students with disabilities placed unilaterally at a private school where the public agency has made available an appropriate education. 125 F.3d 1017, 26 IDELR 864 (7th Cir. 1997).

Collective Bargaining

In **QR** Oct.-Dec.:95, there was a report of the trial court decision in Indiana State Teachers Assoc. (ISTA) et al. v. Board of School Commissioners of the City of Indianapolis, which upheld 1995 legislative action restricting within the Indianapolis Public School (IPS) the areas for collective bargaining (salary, wages, and related fringe benefits). The trial court rejected the ISTA’s challenges to the law that: (1) it was an unconstitutional *ex post facto* law impairing the obligation of a contract; (2) the law was unconstitutionally included with unrelated laws when passed as a part of P.L. 340-1995; and (3) the law subjects IPS teachers to disparate treatment, denying them equal protection under the law. Instead, the court found: (1) there is no impermissible impairment of current contractual rights because the contract period had ended, and the right to bargain collectively is wholly a creature of statute and, hence, a legislative prerogative; (2) the law was part of the budget bill and was generally related to the other parts; and (3) the law does not specifically mention IPS although this is the only school district at present to which the law (I.C. 20-3.1) would apply. The ISTA and its local affiliate appealed.

The Indiana Court of Appeals, in a somewhat lukewarm fashion, affirmed the trial court's rulings. ISTA et al. v. Board of School Commissioners of the City of Indianapolis, 679 N.E.2d 933 (Ind. App. 1997). The appellate court noted that Indiana's constitution (Article IV, §19) confines bills to one subject. However, "our supreme court has taken a laissez-faire approach to determining whether a violation of a single-subject requirement has occurred" although "[t]he wisdom of taking such an approach [has been] criticized..." At 935. The appellate court lamented that the inclusion of a number of generally related subjects "is the very logrolling that Section 19 of our Constitution was designed to prevent." The General Assembly is, nevertheless, accepting "the supreme court's implied invitation" in continuing this practice. Notwithstanding such "tenuous connections," the appellate court is "bound to follow [the supreme court's] precedent." *Id.* The appellate court was more definitive in rejecting the ISTA's assertion that the law is directed only at IPS and is not a general law of uniform application around the state, as required by Article IV, §23. The appellate court noted that the supreme court has previously upheld population classifications in statutes even though such population classifications result in making the statute applicable to one county (or one school district in one county, as in this case). At 936. "The mere fact that no other county presently qualifies does not render an Act unconstitutional." *Id.* However, also citing from supreme court precedent, the appellate court warned that "the mere presence of a population restriction does not convert an otherwise special law into a general and uniform law." *Id.* Notwithstanding this shift by the supreme court, the appellate court upheld I.C. 20-3.1 as a special law justified by specific, enumerated circumstances within IPS which "could not be adequately addressed through a general law thereby making a special law necessary." At 938.

Metal Detectors and the Fourth Amendment

Although courts have generally found favor with the use of metal detectors in public schools where there is a demonstrated need for such measures and students and parents have notice (see **QR** J-S: 96, O-D: 96, J-M: 96), the two-pronged test of New Jersey v. T.L.O., 469 U.S. 325, 105 S.Ct. 733 (1985) still applies: (1) there must be reasonable grounds for suspecting that a student is violating a law or a school rule; and (2) the search is not excessively intrusive in light of the age and sex of the student and the nature of the infraction. In D.I.R. v. State of Indiana, 683 N.E.2d 251 (Ind. App. 1997), the Indiana Court of Appeals reversed the plaintiff's adjudication of delinquency for the possession of marijuana. The plaintiff was a 16-year-old student attending an after-school alternative program for students dismissed from their regular public school program. The public school had a policy requiring every student who enters the school to be searched by an electronic wand metal detector. If the metal detector indicates the presence of contraband (e.g., a weapon or a pager), the security officer requests the student to remove the items or the officer removes it himself. D.I.R. arrived 30 minutes late for class. The security officer had already locked the metal detector in the principal's office for the evening. Nevertheless, the security officer manually searched D.I.R.'s pockets and discovered marijuana and related paraphernalia. The Court of Appeals acknowledged that the metal detector scan was routinely conducted on every student who impliedly consented to the search. But the manual search, which the security officer described as "improvisational," was not the sort of search to which D.I.R. would have impliedly consented. There was no reasonable basis to believe any law or school rule was being violated, the search was unreasonable, and the search was excessively intrusive given the lack of

provocation. The evidence should have been suppressed. As a consequence, D.I.R.'s adjudication of delinquency was reversed.

"Fair Share" and Collective Bargaining Agreements

1. Although the Indiana General Assembly amended I.C. 20-7.5-1-6(a) in 1995 to remove the so-called "fair share" provision which required nonunion teachers to provide some financial support to the school employee organization (see **QR** Jan.-Mar.: 97), there are continuing disputes being reported. In Anderson v. Yorktown Classroom Teachers Assoc., 677 N.E.2d 540 (Ind. App. 1997), the court, in addressing a dispute occurring before the effective date of the statutory amendment, upheld the use of the American Arbitration Association (AAA) to arbitrate the issue of the amount "fair share" due the collective bargaining unit from nonmembers. The use of the AAA has been found to be an adequate independent, non-judicial means for addressing such issues. See, for example, Florenz v. John Glenn Ed. Assoc., 656 N.E.2d 864 (Ind. App. 1995), transfer denied (1996). The court rejected the nonunion teacher's argument that AAA is inappropriate because the parties do not have input in the selection of the arbitrator, and that the rules for Alternative Dispute Resolution (ADR) should be applied. The court stated that ADR rules "apply only in cases that have been filed in the courts of this state." At 542. Because the selection of the arbitrator was not "the unrestricted choice of the union," the procedure passes judicial muster. The use of AAA procedures in such matters was approved in Ping v. National Education Assoc., 870 F.2d 1369 (7th Cir. 1989).
2. In contrast to Yorktown, *supra*, the Indiana Court of Appeals found two other contracts between school boards and bargaining units infringed unconstitutionally upon nonunion teachers' First Amendment rights to freedom of expression and freedom of association. In both Ford et al. v. Madison-Grant Teachers Assoc., 675 N.E.2d 734 (Ind. App. 1997), trans. den., and Anderson et al. v. East Allen Education Assoc., 683 N.E.2d 1355 (Ind. App. 1997), the contracts between the respective teacher unions and school boards established the "fair share" of nonunion teachers to be the same as for members. Unlike Yorktown there were no procedures to determine a "fair share" so as to "avoid the risk that their [nonunion teachers'] funds will be used...to finance ideological activities unrelated to collective bargaining." Ford, 675 N.E.2d at 738; Anderson, 683 N.E.2d at 1357. Both courts noted the fees were the same for union and nonunion members, but that full union dues include "non-chargeable union activities, such as political and ideological activities" to which the nonunion teachers may disagree. "Compelling nonunion teachers to subsidize political and ideological activities as a condition of employment violates the nonunion members' First Amendment right to freedom of expression and freedom of association." Ford, 675 N.E.2d at 738-39; Anderson 683 N.E.2d at 1357. Such a contract is "fundamentally unconstitutional." Anderson, 683 N.E.2d at 1357. (The Anderson case is also notable because several of the nonunion teachers involved in this dispute are former or current members of the Indiana General Assembly.)

Athletics: No Paean, No Gain

Edward D. “Fast Eddy” Feigenbaum, Esq., publisher of *Indiana Legislative Insight* and *Indiana Education Insight*, noting the recent commentaries in the **QR** regarding Indiana Basketball, added that it is a Class C felony in Indiana for any person to bribe an athletic official or for an athletic official to accept such a bribe such that “he will fail to use his best efforts in connection with that contest, event, or exhibition.” I.C. 35-44-1-1(6). This is literally considered “Official Misconduct” in Indiana.

Strip Searches

The U.S. Supreme Court’s decision in New Jersey v. T.L.O., 469 U.S. 325, 105 S.Ct. 733 (1985) establishes a “two fold inquiry” to determine whether a search by school officials is reasonable. However, expanding this inquiry to more invasive strip searches of students is proving difficult for courts. The “twofold inquiry” in T.L.O., which did not involve strip searches, provides that : (1) the search must be “justified at its inception” (a law or school rule is being broken or there is a reasonable basis to believe such will occur); and (2) the search must be “reasonably related in scope to the circumstances which justified the interference in the first place.” Id., 469 U.S. at 333, 105 S.Ct. at 738. The court also added that “such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and are not excessively intrusive in light of the age and sex of the student and the nature of the infraction.” Id., 469 U.S. at 342, 105 S.Ct. at 743.

In Recent Decisions 1-12:95, Oliver v. McClung, 919 F.Supp. 1206 (N.D. Ind. 1995), an Indiana “strip search” case was reported. The court found unreasonable and, hence, unconstitutional the “strip search” of two seventh grade girls alleged to have taken \$4.50. The Oliver court noted that strip searches would be upheld where there was “a threat of imminent harm” from drugs or weapons. The theft of \$4.50 is not such a threat. In a case remarkably similar to Oliver, the 11th Circuit Court of Appeals has reached a different conclusion. Jenkins v. Talladega City Board of Education, 115 F.3d 821 (11th Cir. 1997) involved two female, eight-year-old second grade students who were accused of taking \$7.00. The facts in the case are very much in dispute, but it appears a number of students accused the girls, and they accused each other (as well as implicating a male student). A relatively innocuous search was conducted of one student’s backpack. The students’ socks and shoes were eventually checked, but no money was found. Eventually, the two students were taken to the girls’ restroom where a “strip search” was conducted. The money was never found, even during a subsequent “strip search.” In affirming the district court’s grant of summary judgment to the school officials, the majority of the court, while acknowledging school officials “exercised questionable judgment given the circumstances,” nevertheless felt the law is so unsettled in this area (and especially on May 1, 1992, when the searches occurred) that there was “no clearly established constitutional right” implicated such that the school officials “should have known that their conduct” violated anyone’s constitutional rights. Jenkins, 115 F.3d at 828. The 11th Circuit felt that the “twofold inquiry” of T.L.O. is not specific enough to place school officials on notice of the extent of Fourth Amendment protections

in all school settings. Id. “[S]chool officials cannot be required to construe general legal formulations that have not once been applied to a specific set of facts by any binding judicial authority.” Id., at 827. (This statement by the court specifically rejects decisions from Indiana and any other court except the 11th Circuit, the U.S. Supreme Court, and the highest judicial authority in the state where this dispute arose.)

There is a sharp division between the majority opinion and three dissenting judges, who believe T.L.O. and its progeny from other circuit courts are abundantly clear that “a strip search of school children for seven dollars is unconstitutional.” Id., at 831. The scope of the search was unequivocally excessive due to the personal intrusiveness in consideration of the suspected infraction as well as age and sex of the students. Id. at 832. The dissent concluded with a well known statement from an Indiana dispute decided prior to T.L.O.: “It does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of constitutional rights of some magnitude. More than that: it is a violation of any known principle of human decency.... [S]imple common sense would indicate that the conduct of the school officials in permitting such a nude search was not only unlawful but outrageous under ‘settled indisputable principles of law.’” Id., at 834, quoting Doe v. Renfrow, 631 F.2d 91, 92-93 (7th Cir. 1980), cert. den., 451 U.S. 1022, 101 S.Ct. 3015 (1981).

Notwithstanding this divided court and the difference of opinions among the circuit courts, the U.S. Supreme Court declined on November 10, 1997, to review the decision in Jenkins.

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Date

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